

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

CHRISTOPHER CANADA,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

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Case No. CIV-14-1360-HE

REPORT AND RECOMMENDATION

Petitioner, a prisoner appearing pro se, has filed a petition for a writ of habeas corpus, (ECF No. 1) under 28 U.S.C. § 2254. United States District Judge Joe Heaton referred the matter to the undersigned Magistrate Judge for preliminary review, for conducting any necessary hearings, including evidentiary hearings, for the entry of appropriate orders as to non-dispositive matters, and for the preparation and submission of proposed findings and recommendations as to dispositive matters referenced in 28 U.S.C. §636(b)(1)(B) and (C).

The undersigned Magistrate Judge entered an order on December 15, 2014, (ECF No. 5), notifying Petitioner that he had neither paid the \$5.00 filing fee nor submitted a motion/application for leave to proceed *in forma pauperis*. Additionally, the Petitioner was advised that he had failed to name a proper respondent. Petitioner was ordered to cure this deficiency by January 5, 2015, and advised that if the deficiency was not cured, the undersigned would recommend dismissal of the action without prejudice.

On December 23, 2014, the Petitioner filed an Application for Leave to Proceed *In Forma Pauperis*, (ECF No. 10). However, Petitioner has failed to fully comply with the Court's Order, (ECF No. 5). Specifically, Petitioner has not provided a certificate executed by an authorized officer of the appropriate penal institution stating (1) the amount of money or securities currently on deposit to the prisoner's credit in any institutional account; (2) the average monthly deposits to the prisoner's account for the 6-month period immediately preceding the filing of the action; and a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of this action, obtained from the appropriate official of each prison at which the prisoner is or was confined. The Petitioner does attempt to furnish part of this information by answering the certification portion and indicates in his answer to No. 7 of the Application (ECF No. 10) that he has funds totaling \$320.00 in his institutional accounts.

It is therefore recommended that Petitioner's Application to Proceed in District Court Without Prepaying Fees or Costs, (**ECF No. 10**), be **DENIED**, and that he be ordered to prepay the full \$5.00 filing fee for this action to proceed. 28 U.S.C. § 1915(a)(1); *Lister v. Department of the Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005) (if magistrate judge finds that motion to proceed *in forma pauperis* should be denied, such should be in the form of a report and recommendation). It is further recommended that this action be dismissed without prejudice unless Petitioner pays the \$5.00 filing fee in full to the Clerk of the Court within twenty (20) days of any order

adopting this Report and Recommendation. Finally, in light of this recommendation, it is further recommended that the four “motion[s] for order,” (**ECF Nos. 2, 6, 8, and 9**), be **DENIED**. By these motions, Petitioner seeks vacation of his state convictions; they seek no other relief than that sought by the action itself.

The undersigned also notes that on *December 24, 2014*, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Tenth Circuit from the “final judgment” entered in this action on *December 26, 2014*. (ECF No. 11). The undersigned magistrate judge has nonetheless entered the instant Report and Recommendation, finding that the Notice of Appeal does not transfer jurisdiction to the Tenth Circuit Court of Appeals under the circumstances of this case, and therefore does not prevent the entry of a recommendation denying Petitioner’s motion to appear *in forma pauperis*. *See Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227, 1229 (10th Cir. 1998) (although it is axiomatic that an effective notice of appeal transfers jurisdiction from the district court to the court of appeals, there are pertinent limitations on this transfer of jurisdiction such as an attempt to appeal from a nonappealable order). Accordingly, Petitioner is advised that even though he has filed a Notice of Appeal, **Petitioner remains obligated to pay the \$5.00 filing fee in full to the Clerk of the Court within twenty (20) days of any order adopting this Report and Recommendation.**

Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of Court by **January 16, 2015**, in accordance with 28

U.S.C. § 636 and Fed. R. Civ. P. 72. Petitioner is further advised that any failure to make timely objection to this Report and Recommendation waives the right to appellate review of the factual and legal issues addressed herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED on December 31, 2014.



SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE